**BOARD OF ALIEN LABOR CERTIFICATION APPEALS**
**800 K STREET, N.W.**
**WASHINGTON, D.C. 20001-8002**

**DATE: March 21, 1997**

**CASE NO: 94-INA-594**

**In the Matter of:**

**D. H. KIM ENTERPRISES, INC.,**
**Employer,**

**On Behalf of:**

**KONG SIK LEE,**
**Alien.**

Appearance: Samuel G. Kooritzky, Esq.
Arlington, VA
for the Employer

Before: Holmes, Vittone, and Wood
Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

## DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Kong Sik Lee (“Alien") filed by Employer D. H. Kim Enterprises, Inc. ("Employer")[1] pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C.
§ 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, Philadelphia, PA, denied the application and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

[1]As used herein, Employer also refers to D.H. Kim.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

## STATEMENT OF THE CASE

On January 28, 1993, as amended, Employer, a General Contractor, filed an application for labor certification to enable the Alien, a Korean national, to fill the position of "Assistant superintend[e]nt." Eight years of grade school, four years of high school, and four years experience in the related occupation of "construction" were required. The job offered was described as:

> Assist site supervisor with ongoing renovation and maintenance proj[]ect to assure work is on schedule, that quality is up to standard, and that costs are at or below projections. Assist in analyzing progress reports, communicate with project managers, other workers, and liaison with subcontractors. Travel to various site locations.

(AF 93). Special Requirements were:

> Must be able to communicate in Korean. Must be able to read blueprints and knowledge of project estimation.

(AF 93). In support of the Korean language requirement, the Employer submitted a "Justification for Korean Capability" which stated that the company had a strong relationship with Korean business and individual Korean clients all over the D.C. area, requiring constant communication. The Employer argued that because most of the laborers and members of management (of the Employer) are Korean, and more than ninety percent of its clients are Korean and have difficulty understanding English, "it is

essential that the incumbent speak Korean and possess a good command of the Korean language." (AF 90).

A transmittal form from the state agency indicated that there were five applicants, none of whom were hired. (AF 63-64). However, the Employer's agent indicated by letter of December 17, 1993, that not a single resume was received for any of the five and there was no record of them calling about the position. (AF 74).

On March 16, 1994, the CO issued a Notice of Findings in which he notified the Employer of the Department of Labor's intention to deny the application on several bases. Specifically, the CO determined that: (1) the Korean language requirement was unduly restrictive and was not supported by evidence of business necessity (citing 20 C.F.R. § 656.21(b)(2)); the Employer was requested to provide specific requested information or to delete the requirement and readvertise; (2) if the foreign language requirement is not deleted, a new posted notice in the Korean language for the benefit of non-English speaking employees should be posted (citing 20 C.F.R. § 656.20(g)(3)); (3) the discrepancy between the use of both job titles "Management Trainee/Assistant" and "Assistant Superintend[e]nt" in item 9 on different ETA 750 A forms must be clarified;(4) recruitment results must be reported, and the statement in the December 17, 1993 to the effect that no resumes were received or contacts made is inconsistent with statements provided by the Virginia Employment Commission (citing 20 C.F.R. § 656.21(j); and (5) corrections made to Form ETA 750 A must be initialed or a written statement provided. (AF 59-62).

The Employer submitted its rebuttal on April 18, 1993 through the letter of its attorney with supporting documentation. (AF 44-55).

On May 24, 1994, the CO issued a Final Determination in which he found the Employer's rebuttal satisfactory on the posted notice and name discrepancy issues but inadequate on the language requirement and recruitment results issues; he denied the application on the latter two grounds. (AF 38-43).

The Employer, through its attorney, requested review of that denial on June 28, 1994. (AF 1-37).

## DISCUSSION

The CO denied the application on two bases -- failure to establish business necessity for the foreign language requirement and failure to provide a recruitment report.

**Recruitment Report**

Section 656.21(j)[2] requires the employer to provide the local office with a written report of the results of the employer's post-application recruitment efforts. In this case, the CO found the Employer's report deficient because it consisted of a statement from the Employer's attorney to the Virginia Employment Commission to the effect that no resumes had been received and there was no record of anyone calling to inquire about the position. (AF 74). It is worth noting that the newspaper advertisement directed interested applicants to call a specified number (that of the Virginia Employment Commission) in order to apply. (AF 75, 80, 82). In response to the Notice of Findings, in an unsigned, undated enclosure to a letter from the Employer's attorney, it was stated that it was only upon consultation with his secretary that the Employer first learned there had been several calls to inquire about the position. However, the secretary had asked the inquiring applicants to mail in a resume, following the receipt of which an interview would be scheduled, but no resumes were received, and the Employer was unable to contact the applicants. (AF 56-57).

The CO found the Employer's response inadequate for the following reasons:

> You have provided no explanation as to why you had your secretary be responsible for responses to your recruitment effort, nor have you provided any explanation as to why you did not communicate with your secretary during the recruitment process, but did so after the issuance of the Notice of Findings, in order to establish whether there were, in fact, any applicants for your job opportunity. In addition, you have not provided any evidence that your secretary informed the applicants to submit a resume. In fact, you previously made the assumption that since you received no resumes there were no applicants. Now you assume that since there were no resumes, the applicants were not interested, since your secretary mentioned the need to speak Korean, or "perhaps any number of other reasons." Your results of recruitment is based entirely on assumptions, not fact. Your results of recruitment remain in violation of the regulations.

The CO went on to cite 20 C.F.R. §§ 656.21(b)(6) and 656.[2]0(c)(8) and, after noting that the advertisement had not required the submission of resumes and that the first attempt to contact the applicants was four to five months after referral, the CO stated that the Employer's actions did not reflect a good faith effort to recruit or demonstrate there was a lawful, job-related reason for rejection of the applicants.

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[2] All section references are to title 20 of the Code of Federal Regulations.

Assuming, ***arguendo,*** that the Employer may have failed to submit adequate documentation reflecting a good faith recruitment effort or a lawful basis for rejecting the applicants, these particular grounds were not stated in the Notice of Findings, which was confined to challenging the accuracy of the recruitment report under section 656.21(j)(1). Accordingly, to the extent that the CO wished to rely upon them as a basis for denying the application, he should have issued a supplemental Notice of Findings, but failed to do so. We cannot, therefore, rely upon these grounds as a basis for denial of the application.

Turning to the recruitment report, we note that the Employer technically complied with the requirement that such a report be submitted through counsel's letter of December 17, 1993 (AF 74), which was not challenged by the CO on the basis that it was provided by counsel, and there is no reason to question the Employer's explanation as to why the contacts with the applicants were not reflected in the report. Accordingly, we do not find failure to comply with section 656.21(j)(1) to be a basis for denial of the claim.

**Foreign Language Requirement/Business Necessity**

The other basis upon which the CO denied the application was that the Korean language requirement was unduly restrictive and unsupported by a showing of business necessity (citing 20 C.F.R. § 656.21(b)(2)). That section, ***inter alia***, requires that an employer document that the job opportunity has been described without unduly restrictive job requirements and further provides that a job opportunity shall not include requirements for a language requirement other than English, unless supported by a showing of business necessity. In order to establish business necessity under section 656.21(b)(2)(i), an employer must demonstrate that the job requirements (1) bear a reasonable relationship to the occupation in the context of the employer's business and (2) are essential to perform, in a reasonable manner, the job duties as described by the employer. ***In re Information Industries, Inc.***, 88-INA-82 (Feb. 8, 1989) (***en banc***). A foreign language requirement may be justified by plans for expansion of business into a foreign market. ***Remington Products, Inc.,*** 89-INA-173 (Jan. 9, 1991) (***en banc***). It may also be justified when the business requires frequent and constant communication with foreign-speaking personnel. ***Capetronic USA Manufacturing, Inc.,*** 92-INA-18 (Apr. 12, 1993); ***Bestech Group of America, Inc.,*** 91-INA-381 (Dec. 28, 1992). ***See also Sysco Intermountain Food Services,*** 88-INA-138 (May 31, 1989) (***en banc***) (business necessity for knowledge of Cantonese and Mandarin dialects shown when contacts with restaurant owners and suppliers require communication in Chinese).

In support of the original application, Employer submitted an unsigned, undated "Justification for Korean Capability" (AF 90), which stated that the Employer, a general contractor, "has established a strong relationship with Korean businesses and individual Korean clients all over the [D.C.] area" which "requires continuous communication with businesses and individual clients." The Employer further stated

that more than ninety percent of its clients are Korean, that very few spoke English well, and that none could "understand technical English." Thus, the Employer argued that it was "essential that the incumbent speak Korean and possess a good command of the Korean language." (AF 90).

In the Notice of Findings, the CO stated that in order to rebut the finding that the foreign language requirement was not supported by evidence of business necessity, the Employer would have to either delete the requirement or submit evidence showing that the job requirement arose from a business necessity rather than employer convenience. The CO specified that rebuttal evidence would have to include responses to 6 specific questions and:

> 7. Other documentation which will clearly show that fluency in Korean is essential to employer's business, such as written statements from your employee[]s and clients attesting to the fact that they are unable to communicate in or understand English. Each written statement must be accompanied by a certified translation into English. (AF 39).

In its rebuttal, the Employer elaborated further and provided the information requested by the CO in the Notice of Findings, stating, ***inter alia,*** that the Employer had 30 clients, that less than 25% were non-English speaking, that the need for Korean speaking supervisors was due primarily to the nature of the staff rather than the clients, that 90% of the employees are non-English speaking and 90% of the business relies on ability to speak Korean, and that the business would be severely impacted if the Korean language were not used as instructions by supervisors would not be understood and the work would not be done. (AF 45-46). In a supporting letter dated April 13, 1994, the Vice President of the Company stated that the Employer had a large number of skilled employees who did not speak English very well, that communication between foremen and workers was essential, that many foremen/supervisors did not speak English very well, that the Employer was attempting to recruit bilingual managers, that in the meantime there were labor shortages, and that there were currently 45 Korean speaking people. (AF 47).

In the Final Determination, the CO stated that the response was inadequate with respect to item 7 because the Employer had failed to provide written statements from employees attesting to the fact that they are unable to communicate in or understand English. (AF 34-35).

We do not find the CO's position on this issue to be supportable. In this regard, by the use of the words "such as," the CO suggested statements by employees would be appropriate documentation to support the need for the foreign language, but there was no absolute requirement that these statements be produced and a statement by the Vice President of the Employer to the same effect would also constitute appropriate

documentation. Accordingly, the Employer has made a showing of business necessity for the foreign language requirement.

In view of the above, the application for labor certification should be granted.

**ORDER**

The Certifying Officer's denial of labor certification is hereby REVERSED and the CO is directed to GRANT labor certification.

For the Panel:

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PAMELA LAKES WOOD
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk**
**Office of Administrative Law Judges**
**Board of Alien Labor Certification Appeals**
**800 K Street, N.W.**
**Suite 400**
**Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: D.H. Kim Enterprises
(Alien: Kong Sik Lee)

Case No. : 94-INA-594

PLEASE INITIAL THE APPROPRIATE BOX.

| | CONCUR | DISSENT | COMMENT |
|---|---|---|---|
| Vittone | | | |
| Huddleston | | | |

Thank you,

Judge Wood

Date: